ATTACHMENT C

Planning Commission Written Comments- November 10, 2015

TC1500001 – Omnibus UDO Amendments 9

Buzby – I vote to approve.

Hyman – Voted approval.

Harris – Voted for plus comments consideration.

Hollingsworth – Approve.

Miller –This omnibus proposal to amend the UDO is not ready for final adoption in the form it was submitted to the Planning Commission. It should be approved only if the following corrections are made:

Sec. 3.16.3.A.3 – Initiating the Creation of an Historic District Overlay

The requested change would give the city council (or the BOCC in cases involving the county's jurisdiction) the discretionary authority to decide whether the initiation of the process of creating an historic district in petition cases can move forward. This change to the ordinance as written violates due process. It should be removed from the omnibus changes until a better amendment is proposed.

This provision in the UDO concerns how to begin the process of considering whether to create a local historic district. It does not concern the how the final decision of whether to create a district is made.

Under the ordinance currently, there are two ways to initiate the process:

1) Under sec. 3.16.2.A.1, the process may be initiated by a petition of the owners of 25% of the property in a proposed district. The petition, if approved by the HPC, requires the city or county to prepare a draft preservation plan for consideration by the HPC, the Planning Commission, and ultimately the city council or BOCC. The final decision is up to the governing body, but the petition compels the process to begin and requires the planning staff to prepare the draft preservation plan for consideration. The governing body cannot stop the process at this point. The language in the ordinance ties its hands.

2) Under sec. 3.16.2.A.2, the process may be initiated by the appropriate governing board on its own motion. This discretionary power is inherent to the city and county. Under this power, the city council or BOCC may direct staff to

> prepare a preservation plan for a new district if one or more members of the governing body can convince a majority of his fellows to support a motion. Any single citizen can ask the elected body to exercise this discretionary power to commence the process of creating a district. Whether the body responds to the request depends upon how persuasive the citizen is. This is true of any discretionary power vested in local government. Every citizen has the right to petition his elected officials to use their discretionary authority or to withhold it.

The first method of initiating the process of creating an historic district, a petition by the owners of 25% of the property in the district, is lawful only because it constrains the discretionary authority of the government. It can require the expenditure of staff resources without resort to or intervention by the elected body. The proposed amendment would make the petition method of initiating the historic district process discretionary by sending the petition to the elected body to determine whether it may move forward. If the power to constrain the city council's or BOCC's discretionary authority to commence the process is removed, the petition method becomes a false requirement in that it pretends that only a certain class of persons (property owners) and a certain threshold of them (the owners of 25% of the property in the proposed district) can ask the government to exercise their discretionary power. In fact, any person, property owner or not, may ask the city council or BOCC to commence the process. It is a violation of due process to limit a citizen's right to ask the government to exercise its discretionary authority by means of a property qualification or by requiring the citizen join with others merely to ask.

The planning staff finds the current petition process unsatisfactory because it interferes with the way in which it develops its plans to deploy limited staff resources. To be sure that the staff is using its resources to prosecute priorities identified by the city council and the BOCC, the staff develops a work plan which is reviewed by citizens, planning agencies, the JCCPC, and approved by the BOCC and council. When a petition to initiate a new historic district is sufficient and approved by the HPC, the staff is given a new priority, the creation of the preservation plan, which is not part of the work plan and is not subject to intervention by elected officials inasmuch as they are as bound by the requirements of the current UDO as anyone else is. This absence of discretion is disruptive to the orderly deployment of resources. This is something that should be addressed, but not in the way that has been proposed. It is not fair to require citizens to jump through the hoops to prepare a valid petition, when in fact, they could just as easily ask the council or the BOCC to initiate the process without jumping through the hoops.

It would be better to eliminate the petition system altogether. Instead, I recommend that there be an application process that requires someone who wants to create a new historic

district to bring the HPC a description of the district and a survey of its historic assets which meets the standards of a nomination for a National Register Historic District. If the HPC approves the application, then the a proposed preservation plan (meeting identified standards) could be prepared by the applicant. If the applicant wants the planning staff to prepare the preservation plan, the applicant could ask the city council or BOCC to approve the expenditure of staff resources. If the answer is yes, it goes on the work plan. If the answer is no, the applicant will either have to prepare the draft plan himself or drop his application. This is sort of the way other jurisdictions approach the process – more like a rezoning where the applicant is required to do the work, not the local government staff. This way of doing things will become even more straightforward because we are now eliminating review criteria from individualized preservation plans. The new plans will consist mostly of survey materials which are invariably prepared by private historic preservation consultants. There is no reason to require that the creation of the draft preservation plan be the exclusive duty of Durham's planning staff.

The petition process in our code is a Durham procedure not seen in the processes used in other major jurisdictions. Let's get rid of it and instead look at application processes used in jurisdictions like Winston-Salem.

Sec. 3.16.4.E.1 Metes and Bounds

This proposed amendment would require a metes and bounds legal description where any legal description sufficient to convey (plat map reference) would do as well or even better. Under the proposed amendment, in some cases, citizens would have to hire a surveyor to comply with a metes and bounds requirement when he might simply have used the plat map reference from his own deed. Let's say "legal description sufficient to convey by deed" instead of metes and bounds.

Sec. 1.6 Incorporation by Reference - Future Changes

This proposed amendment provides that when the city council or BOCC decides to incorporate into the UDO standards published by a third party in a manual or other document , the incorporation will include any future changes or updates the third party may make to the standards in the manual or document without reexamining and voting on the new or changes standards. This attempt to incorporate future changes by reference is not lawful. This provision must be removed from TC1500001 or changed to conform to the law. Cities and Counties have the express statutory authority to adopt standards or regulations into ordinances by reference. They do not have authority to adopt future changes by reference. When the General Assembly has allowed government entities to adopt future changes into regulations, it has done so only by an express statutory grant. State Government agencies are expressly allowed to do so by the provisions of Chapter 150B of the General Statutes. The authority to

adopt by reference contained in Chapters 153A (counties) and 160A (cities) does not allow adoption of future changes. It may be convenient to adopt future changes, but it is at very best on shaky legal grounds and it is very bad policy. The reason for treating state agencies and cities and counties differently is that Chapter 150B requires review of agency rules by the Rules Review Commission and provides direct legislative oversight of the process. There are no similar procedural safeguards for the ordinances adopted by cities and counties.

When the city or county adopts an ordinance which has the force and power of law, it publishes the proposed ordinance and invites public comment before making a final decision. Notice to affected citizens and an opportunity for the be heard are the essential components of due process. When the city or county proposes to adopt into its ordinances a rule or standard contained in a manual or document prepared by some third party, - an expert, a trade organization, a non-profit think-tank, another city, etc. – it refers specifically to the manual or publication so that those who will be impacted if the proposed rule is adopted can look up the referenced manual or standard to comment on it before final adoption occurs. When the ordinance is adopted, only the version of the standard or manual specifically referred to in the ordinance becomes part of the law. This is what the General Assembly allows. If the ordinance purports to adopt automatically whatever changes the third party may make to his standards or manual in some new, future addition, then the city or county has unlawfully delegated its law-making power to the third party who is not answerable to citizens. There can be no notice of a change to the third party material. No opportunity to be heard. Due process is frustrated. Why, if it were lawful for Durham to incorporate future changes to third party materials by reference, Durham could arguably scrap its UDO and instead adopt the zoning ordinance of Southport and all its future amendments by reference. That way we could let that coastal city handle our zoning law-making for us. It's absurd, of course, and that's why it is unlawful.

It is a far better practice and a lawful one to consider future changes to incorporated materials as they occur and to update changes to ordinance requirements with notice and an opportunity to comment each time our own review of the new material tells us as a community that doing so is right for Durham.

<u>Sec. 5.3.3.C.1 Setbacks</u>

This provision proposes to create setback requirements for certain civic club buildings by referring to the setback provisions contained in section 6.9. The problem is that section 6.9 contains no setback requirements as such. Instead it refers to rear, street, and side yards. This is a minor fix.

Whitley – I vote to approve.

Winders – I recommend approval with addition of a minor change to clarify the definition of compact neighborhood and Downtown Tiers as well as the intent statements for the RC, CD, and CD district presentation at the October Planning Commission meeting. Consideration should also be given to addressing several points raised by other Commissioners.